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Return Date:
April 26, 2017 at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re:

**LADERA PARENT LLC and
LADERA, LLC,**

Debtors.

Chapter 11

Case No.: 16-13382 and
16-13383-mew
(Jointly Administered)

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DEBTORS' MOTION FOR ENTRY OF ORDER (I) APPROVING BIDDING PROCEDURES IN CONNECTION WITH THE PROPOSED SALE OF ASSETS OF THE ESTATES AND (II) AUTHORIZING AUCTION SALE

TO THE HONORABLE MICHAEL E. WILES,
UNITED STATES BANKRUPTCY JUDGE:

The debtors and debtors in possession, **Ladera Parent, LLC ("L.P.")** and **Ladera LLC** ("Ladera" and collectively the "Debtors"), by their attorneys, seeks the entry of an order (the "Bidding Procedures Order"), a proposed form of which is annexed to this application authorizing and approving the terms of sale (the "Bidding Procedures") for the proposed sale of the Debtors' assets as more fully set forth below, and authorizing Auction Sale[1] pursuant to 11 U.S.C.§§105(a), 363 and 365 of Rules 2002, 6004 and 6006 of the

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[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Bidding Procedures.

Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") (the "Motion") as Exhibit A. In support thereof, the Debtors state:

JURISDICTION AND VENUE

1. Jurisdiction over this application is vested in the United States District Court for this District pursuant to 28 U.S.C. §1334.

2. This motion has been referred to this Court for consideration pursuant to Section 157 of the Judicial Code and the *Standing Order of Reference Regarding Title 11* (S.D.N.Y. Feb 1, 2012) (Preska, C.J.).

3. This is a core proceeding arising under title 11 of the United States Code the "Bankruptcy Code"). See 28 U.S.C. §157(b)(1). The statutory predicate for the relief sought is Sections 105(a), 363 and 365 of the Bankruptcy Code.

4. Venue of this civil proceeding in this district is proper pursuant to 28 U.S.C §1409.

BACKGROUND

5. On December 4, 2016 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). In addition to their petitions for relief, on the Petition Date, the Debtors filed their schedules of assets and liabilities and lists of creditors and executory contracts required pursuant to Section 521 of the Bankruptcy Code and Rule 1007 of the Bankruptcy Rules.

6. No committee, trustee or examiner has been appointed in the Chapter 11 Cases.

7. Ladera owns a real estate development project located at 300 West 122nd Street, New York, New York, which includes the real property (the "Real Property") and the development rights with respect thereto (the "Development Rights" and, together with the Real Property, the "Assets"). L.P. owns 100% of the equity interests in Ladera.

8. The senior lienholder on the Property is RWNIH-DL 122nd Street 1 LLC ("RWN").

9. The Assets are encumbered by a mortgage and note from RWN in the original principal amount of $36,000,000.00 , plus interest, fees, expenses and other costs (the "Secured Claim"). L.P. pledged the membership interest in Ladera as collateral for the Secured Claim.

10. The Debtors will be filing an application for authority to retain Cushman & Wakefield as the real estate broker to market and sell the Assets. After receiving comments from RWN and other parties, Debtors, by their counsel, will seek the retention of the broker all in furtherance of the sale of the Assets and a Chapter 11 plan that was negotiated with RWN.

11. Debtors filed their Chapter 11 plan on March 29, 2017 (the "Plan"), which document contemplates a sale of the Assets with the sale proceeds, based upon the results of the Auction, to be utilized to fund plan payments in accordance with the priorities established by the Bankruptcy Code.

RELIEF REQUESTED

12. By this Motion, the Debtors seek entry of the Bidding Procedures Order,

pursuant to sections 105(a) and 363 of the Bankruptcy Code authorizing them to implement the Bidding Procedures, annexed as Exhibit "1" to the Bidding Procedures Order, for the sale of the Assets. While the Debtors expect the proceeds of the Auction will be more than sufficient to effectuate the sale of the Property pursuant to the Plan, the Debtors also seek authority to sell the Assets to the highest and best bidder, free and clear of all liens, claims and encumbrances outside of a Chapter 11 plan in the event that the Debtors are unable to confirm their Plan. Accordingly, it is important that the Bidding Procedures be in place, and the authority to sell be granted.

Marketing Process

13. Subject to entry of an order authorizing the retention of the broker, the broker is ready to commence the marketing process for the Assets. Accordingly, it is important that the Bidding Procedures be approved. The Assets shall be offered for sale "as is", "where is", and free and clear of all liens, claims and encumbrances, with any such liens, claims and encumbrances to attach to the proceeds in the order, priority and extent as they existed on the Petition Date.

Proposed Bidding Procedures

14. To optimally and expeditiously solicit, receive and evaluate bids in a fair and accessible manner, the Debtors and RWN have negotiated, developed and proposed the Bidding Procedures to govern the sale of the Assets. The Bidding Procedures are designed to encourage all entities to put their best bids forward and enhance the value to the Debtors' estates. All parties are directed to review the Bidding Procedures for their specific terms.

15. In furtherance of the Bidding Procedures Order, the parties will prepare sales and marketing materials for circulation along with the Bidding Procedures to potential buyers in order to maximize the value of the Assets. Interested purchasers may be required to enter into confidentiality agreements prior to their being provided with confidential information regarding the Assets.

16. The proposed Bidding Procedures set forth the parameters for which the Debtors and RWN will consider bids for the purchase of the Assets. Additionally, the proposed Bidding Procedures: (a) provide that the Debtors will send all bidders a form of Purchase and Sale Agreement (the "PSA"), a copy of which was annexed to the Plan and is annexed hereto as Exhibit B, (b) set a bid deadline; (c) define requirements for qualified bids; (d) set an auction date; and (e) give certain parties consultation rights. The proposed Bidding Procedures also provide for, at the Debtors' discretion, subject to consent of RWN and consultation with other parties, a selection of a stalking horse as well as the possibility that the Debtors provide for a breakup fee (the "Breakup Fee"). In the event the Debtors select a stalking horse, the Debtors will file a supplemental notice with the Court identifying the stalking horse and the terms of the stalking horse bid, including any Breakup Fee, and providing parties with the opportunity to object. The Bidding Procedures also recognize RWN's right to submit a credit bid for the Assets.

17. The Plan encompasses the contemplated sale and, upon the selection of a successful bidder, at the conclusion of the auction, the Debtors will present the bid to the Court for approval and seek to confirm the Plan. The proposed confirmation order will

contain provisions: (a) approving (i) the successful bid(s), (ii) the applicable PSA, and (iii) the proposed assumption and assignment of any assumed contracts; and (b) authorizing the Debtors to consummate the proposed transaction(s).

BASIS FOR RELIEF

I. The Relief Sought in the Bidding Procedures Order Is in the Bests Interests of the Debtors' Estates and Should be Approved.

18. By this Motion and the Plan, the Debtors seek this Court's authorization to sell the Assets by public auction sale in accordance with the Bidding Procedures.

19. The sale of the Assets is appropriate and necessary; however, approval of the Bidding Procedures is warranted to ensure that the highest and best offer will be received for the Assets.

20. The Debtors anticipate that any ultimate closing on the sale of the Assets will be conducted pursuant to an order of this Court and confirmation of the Plan.

21. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. See, e.g., In re Integrated Resources, Inc., 147 B.R. 650, 656-57 (Bankr. S.D.N.Y. 1992) (noting that bidding procedures that have been negotiated by a debtor are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid"); In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (same).

22. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. See, e.g., In re Food Barn Stores, Inc., 107

F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand"); Integrated Resources, 147 B.R. at 659 ("It is a well-established principle of bankruptcy law that the . . . [debtors'] duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting In re Atlanta Packaging Products, Inc., 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)).

23. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions. See, e.g., Integrated *Resources,* 147 B.R. at 659 (such procedures "encourage bidding and to maximize the value of the debtor's assets"); *In re Financial News Network, Inc.,* 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991), ("court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates").

24. The Debtors believe that the proposed Bidding Procedures will promote active bidding from seriously interested parties and will elicit the best and highest offers available for the Assets. The proposed Bidding Procedures will allow the Debtors to conduct the sale in a controlled, fair, and open fashion that will encourage meaningful input from key constituents and participation by financially capable bidders who will offer the best package for the Assets, and who can demonstrate the ability to close a transaction. The Debtors believe that the Bidding Procedures will encourage competitive bidding, that they are consistent with other procedures previously approved by this District, and are appropriate under the relevant

standards governing auction proceedings and bidding incentives in bankruptcy proceedings. *See Integrated Resources,* 147 B.R. at 659; *995 Fifth Avenue Assocs.,* 96 B.R. at 28; *see e.g., In re BearingPoint, Inc.,* No. 09-10691 (REG) (Bankr. S.D.N.Y. Apr. 7, 2009) (approving similar bidding procedures); *In re Silicon Graphics, Inc.,* No. 09-11701 (MG) (Bankr. S.D.N.Y. Apr. 3, 2009); *In re Steve & Barry's Manhattan LLC,* No. 08-12579 (ALG) (Bankr. S.D.N.Y. Aug. 5, 2008); *In re Fortunoff Fine Jewelry and Silverware, LLC,* No. 08-10353 (JMP) (Bankr. S.D.N.Y. Feb. 22, 2008).

25. Based upon discussion with the Broker and agreement with RWN, the Debtors expect to request approval of an Auction process that will last approximately 90 days from now until closing of the Sale of Assets (subject to extension as may be agreed to by RWN). The Bidding Procedures do not yet provide for the Auction Date or bid deadlines, which will be agreed upon prior to the Hearing on this Motion and subject to the Court's schedule for confirmation. Notably, it is anticipated that in conjunction with RWN and the Court retained real estate broker, a schedule will be agreed to that provides for sufficient mandatory period to run concurrently with the Plan confirmation process. As mentioned, the expectation is that from the beginning of marketing to approval of the Debtors' Plan, to Closing, the process should be completed in 90 days (e.g., end of June or early July). The Debtors shall file with the Court a copy of the actual Bidding Procedures once the dates have been worked out, but all parties agree that the other terms should be approved and fixed.

26. Section 363(b) of the Bankruptcy Code governs the sale of assets outside the ordinary course of business. Section 363(b)(1) provides, in relevant part, that "[t]he [Debtors], after notice and hearing, my use, sell or lease, other than in the ordinary course of business, property of the estate…" 11 U.S.C. § 363(b)(1). The terms of such sale are generally within the sound discretion of the debtor. See In re Iridium Operating, LLC, 478 F.3d (2d Cir. 2007) ("In this Circuit, the sale of the asset of the estate under §363(b) is permissible if the 'judge determined [the] §363(b) application expressly find[s] from the evidence presented before [him or her] at the hearing that [there is] a good business reason to grant such an application.'" (citing Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F. 2d 1063, 1071 (2d Cir. 1983)); see also Official Comm. Of Unsecured Creditors of LTV Aerospace & Defense Co. v. LTV Corp. (In re Chateaugay Corp.), 973 F.2d 141, 145 (2nd Cir. 1993); In re Dial-A-Mattress Operating Corp., 2009 Bankr. LEXIS 1801, at *12 (Bankr. E.D.N.Y. June 24, 2009) ("The business judgment test is the standard for Section 363 sales in this Circuit." (citations omitted)); In re Hirsch, 360 B.R. 43, 45-46, 48, 50 (Bankr. E.D.N.Y. 2007) (requiring "existence of 'a good business reason to grant such an application'" (quoting In re Lionel Corp., 722 F.2d at 1071)); In re Thomson McKinnon Sec., Inc., 120 B.R. 301, 307-08 (Bankr. S.D.N.Y. 1990).

27. In addition, Section 105(a) of the Bankruptcy Code grants the Court the authority to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. §105(a). This provision

is "the basis for a broad exercise of power [by the Court] in the administration of a bankruptcy case. 2 COLLIER ON BANKRUPTCY ¶105.01 (Alan N. Resnick and Henry J. Sommer. Eds., 16th ed.).

28. In accordance with Bankruptcy Rule 6004(f)(a), sales of property outside of the ordinary course of business may be by private sale or by public sale. In practice, the preferred method is to conduct a public sale will most often result in a greater number of potential bidders in the shortest amount of time. That is, in order to determine that a private sale has yielded the highest or best offer, property generally must remain on the market for a significantly longer period of time than when offered at a public sale.

29. Here, sound business reasons exist for the proposed sale, which will effectively result in the sale of substantially all of the Debtors' assets. See In re Dial-A-Mattress Operating Corp., 2009 Bankr. LEXIS 1801 (a debtor's decision to sell substantially all of its assets to the highest bid at an auction was an appropriate business judgment decision because the highest bid presented the greatest benefits to the Chapter 11 estate).

30. The Debtors have substantial business justification for the proposed sale of the Assets. The Debtors and RWN agree that the sale of the Debtors' Assets is appropriate and necessary and the parties previously agreed to the Bidding Procedures.

II. The Assets Will Be Sold Free and Clear Of All Liens

31. Bankruptcy Code Section 363 permits the sale of assets to be free and clear of liens, claims and interests of an entity in such property if: (a) applicable state law will permit the sale; (b) such entity consents; (c) the price at which the assets is being sold exceeds the liens, claims and interests; (d) the security interest in the property id disputed; or (e) the entity with an interest in the last asset being sold could be compelled in a legal or equitable proceeding to accept a mney satisfaction of its interest in and to the property. See 11 U.S.C. §363(f).

32. Since Bankruptcy Code Section 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to approve the sale of the Assets "free and clear" of liens, claims, encumbrances and interests. See 11 U.S.C. §363(f); Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (recognizing that Section 363(f) of the Bankruptcy Code is written in disjunctive, and holding that Court may approve sale "free and clear" provided that at least one subsection of Section 363(f) is met), cert dismissed, 503 U.S. 978 (1992); Citicorp Homeowners Servs., Inc. v. Elliot (in re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

33. Here, as reflected in the agreed upon Bidding Procedures, the sale of the Assets is being conducted pursuant to, *inter alia*, Bankruptcy Code Section 363(f). All liens will attach to the sale proceeds in the same order and priority as they existed on the Debtors' respective Petition Date. It is expected that the sale of the Assets will include the assignment of certain construction license agreements, and zoning lot and easement

development agreements with neighboring properties, which will be assigned in accordance with applicable bankruptcy law.

III. The Successful Bidder Should Be Afforded Protection Under Bankruptcy Code Section 363(m)

34. Bankruptcy Code Section 363(m) affords protection to a good faith purchaser in any interest in property purchased from an estate, whether the sale conducted is later reversed or modified on appeal. Specifically, Bankruptcy Code Section 363(m) provides as follows:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. §363(m). See Allstate Ins. Co. v. Hughes. 174 B.R. 884, 888 (Bankr. S.D.N.Y. 1994) ("Section 363(m)…provides that good faith transfers of property will not be affected by the reversal or modification on appeal of an unstayed order, whether or not the transferee knew of the pendency of the appeal"); In re Stein & Day, Inc. 113 B.R. 157, 162 (Bankr. S.D.N.Y. 1990) ("good faith purchasers are protected from the reversal of a sale on appeal unless there is a stay pending appeal").

35. The Second Circuit Court of Appeals has held that a party would have to show fraud or collusion between a buyer and the debtor in possession or trustee in order to demonstrate a lack of good faith. See Kabro Assoc. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.), 111 F.3d 269, 276 (2d Cir. 1997) (citations omitted)

("[t]ypically the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders"). See also In re Bakalis, 220 B.R. 525, 537 (Bankr. E.D.N.Y. 1998).

36. Subject to Court approval, the Assets will be sold at a public auction sale. The sale process will be conducted at arm's length through an independent process. As such, the Debtors submit that the Successful Bidder should be afforded good faith purchaser status under Bankruptcy Code Section 363(m).

III. The Proposed Process for the Debtor to Designate a Stalking Horse and Provide a Breakup Fee Should Be Approved.

36. The Debtors also seek authority to designate a stalking horse and offer customary bid protections including a break-up fee as part of the Bidding Procedures. In the event the Debtors designate a stalking horse, with consent of RWN or further order of this Court, that party will subject their bid to higher and better offers, and likely may request the enticement of a break-up fee if the stalking horse loses at auction to another bidder. The use of a stalking horse in a public auction process for sales pursuant to section 363 of the Bankruptcy Code is a customary practice in chapter 11 cases, as the use of a stalking horse bid is, in many circumstances, the best way to maximize value in an auction process by locking in a purchase price "floor" before exposing an asset to auction. As a result, stalking horse bidders virtually always require breakup fees and other forms of bidding protections as an inducement for holding their purchase offer open while it is exposed to overbids in an auction process. Thus, the use of bidding protections, including

breakup fees, has become an established practice in Chapter 11 cases.

37. Bankruptcy courts have approved bidding incentives, similar to the breakup fee, under the business judgment rule, which proscribes judicial second-guessing of the actions of a corporation's board of directors taken in good faith and in the exercise of honest judgment. *See e.g., In re BearingPoint, Inc.,* No. 09-10691 (REG) (Bankr. S.D.N.Y. Apr. 7, 2009) (approving a breakup fee of approximately 3% of the purchase price); *In re Silicon Graphics, Inc.,* No. 0911701 (MG) (Bankr. S.D.N.Y. Apr. 3, 2009) (approving breakup fee of approximately 2.8% of the purchase price); *In re Steve & Barry's Manhattan LLC,* No. 08-12579 (ALG) (Bankr. S.D.N.Y. Aug. 5, 2008) (approving break-up fee of 2% of the purchase price); *In re Fortune Fine Jewelry and Silverware, LLC,* No. 08-10353 (JMP) (Bankr. S.D.N.Y. Feb. 22, 2008) (approving break-up fee of approximately 2.8% of the purchase price); *In re Bally Total Fitness of Greater New York, Inc.,* No. 07-12395 (BRL) (Bankr. S.D.N.Y. Aug. 21, 2007) (approving break-up fee of 4.3% of the purchase price).

38. With respect to breakup fees in bankruptcy cases, courts have generally considered three factors when assessing proposals for such fees: (a) whether the relationship of the parties who negotiated the breakup fee is tainted by self-dealing or manipulation; (b) whether the fee hampers, rather than encourages, bidding; and (c) whether the amount of the fee is unreasonable relative to the proposed purchase price. *See In re Integrated Res., Inc.,* 147 B.R., at 657.

39. The Debtors believe that the ability to select a stalking horse and allowance of a breakup fee is beneficial to its estate and its creditors, as a stalking horse bid would

establish a floor for further bidding and potentially increase the value of the Assets for the benefit of the estate. Here, notably, any stalking horse bidder would need to submit a bid well in excess of RWN's secured claim, thereby setting a floor that will benefit all creditors with a guaranteed recovery under a Plan. The Debtors will make a determination after such consultation as to whether they should consult with other interested parties regarding the selection of a stalking horse, or any other matter related to the sale and if appropriate will solicit their input. Moreover, this motion proposes to provide parties with regard to the stalking horse which will state the Debtors' designation of a stalking horse, including terms for payment of any breakup fee. Parties will have an opportunity to object to the Debtors' designation of a stalking horse and payment of a breakup fee. If a party chooses to object within five days from the filing of the stalking horse notice and such Objection cannot be resolved consensually, the Debtors will seek approval of the stalking horse and breakup fee by scheduling a hearing with the Court based on its availability. If no objections to the stalking horse notice are received, the stalking horse and breakup fee, shall be deemed approved by the Court, without the need for further Court order. Further, if the breakup fee were to be paid, it will be because the Debtors have received a higher or otherwise superior offer.

CONCLUSION

40. Thus, the proposed Bidding Procedures are reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances because the Bidding Procedures are designed to maximize the value to be received by the Debtors' estates.

41. The Debtors have served this application on the Office of the United States Trustee, the holders of twenty largest unsecured claims, RWN, by its counsel, and all parties who have filed notices of appearance in this case. The Debtors submit that such service be deemed appropriate and sufficient under the circumstances.

42. No prior application for the relief sought has been made by the Debtors to this or any other court.

WHEREFORE, the Debtors respectfully request that this Court enter the Order granting the relief requested herein and such other and further relief as may be just and appropriate.

Dated: New York, New York
April 4, 2017

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